

FILED

JUL 26 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LUIS CARVAJAL,

Defendant - Appellant.

No. 04-50547

D.C. No. CR-03-01144-DT-12

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Submitted July 24, 2006**

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges.

Luis Carvajal appeals from his 120-month sentence imposed after pleading guilty to conspiracy and possession with intent to distribute and distribution of cocaine, in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Carvajal contends that, now that the United States Sentencing Guidelines are no longer mandatory, *see United States v. Booker*, 543 U.S. 220 (2005), the district court has the discretion to adjust his criminal history category so that he meets the safety valve provisions and can be sentenced under the mandatory minimum. This contention fails because *Booker* does not bear on the reduction of sentences. *See Booker*, 543 U.S. at 244. Also, the safety valve adjustment, which is governed by statute, prohibits a downward adjustment if the defendant has more than one criminal history point. *See* 18 U.S.C. § 3553(f)(1); *see also United States v. Valencia-Andrade*, 72 F.3d 770, 773-74 (9th Cir. 1995) (stating that 18 U.S.C. § 3553(f) precludes the district court from creating an exception to a mandatory minimum sentence for an over-represented criminal history category).

Carvajal also contends that he is entitled to a remand pursuant to *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc), because it is clear that the district court would have sentenced him differently. This contention is foreclosed by *United States v. Dare*, 425 F.3d 634, 643 (9th Cir. 2005), because Carvajal was sentenced to the statutory mandatory minimum sentence.

AFFIRMED.